Zulpadli bin Mohammad & Ors v Bank Pertanian Malaysia Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(IM)(NCVC)-545–09 OF 2011
ZAINUN ALI FCJ, SULAIMAN DAUD AND RAMLY ALI JJCA
5 DECEMBER 2011

Civil Procedure — Striking out — Writ and statement of claim — Sale and purchase agreement of land — Appointment of solicitors for preparation and completion of financing and charge documents — Transfer perfected — Original directors/shareholders sued parties — Whether transfer and charge transaction illegal, fraud, null and void — Whether approval from Estate Land Board obtained — Cancellation of memorandum of transfer and charge documents — Whether solicitors liable — Rules of the High Court 1980 O 18 r 19(1)(a)

The present appeal arose from the decision of the High Court in dismissing the appellant's application to strike out the respondent's writ and statement of claim under O 18 r 19(1)(a) of the Rules of the High Court 1980 ('RHC'). Briefly, the facts were that the respondent had granted a credit facility to one Magna Iron Sdn Bhd ('MISB') for a sum of RM19,700,000 to finance the purchase of land ('the said land') and as security, the said land was charged to the respondent. The appellants were appointed by the respondent for the preparation and completion of the said financing documents including the charge documents in favour of the respondent. The parties had entered into a sale and purchase agreement ('SPA') and the transfer of the land to MISB and the respondent's charge was registered. The respondent then released the financing amount of RM19,700,000 to the vendor of the land, USESB. The original directors/shareholders of USESB ('the original owners') filed an action against the respondent, MISB, Pendaftar Hak Milik, Pejabat Tanah dan Galian Negeri Selangor and a third party, arguing that the transfer and charge transaction was illegal, fraud, null and void and that there was no approval by the Estate Land Board prior to the transfer of the said land. No defence was filed and the original owners obtained judgment in default of defence. As a result, the order of the memorandum of transfer and the charge documents which were previously registered, were canceled. The respondent proceeded to file an action against the appellants, alleging that, inter alia: the appellants had intentionally failed to conduct their own investigations that requirements under the National Land Code particularly relating to 'prior approval of the Estate Land Board' were satisfied; the appellants had failed to advise the respondent as to the legal requirements of such a transaction and the consequence of a failure to fulfill the same; the appellants did not exercise due diligence and were negligent in presenting the charge documents without first

verifying and obtaining approval from the Estate Land Board; and that the appellants failed to follow prudent banking practice in safeguarding the respondent's interest.

Held, allowing the appeal with costs:

(1) The loss claimed to be suffered by the respondent was the consequence of a fraud by the third party to which the respondent fell victim. The loss was not caused by the failure of the appellants to procure the approval of the Estate Land Board or advice on the same. The security was in any event perfected. It was not the pleaded case of the respondent that the appellants had breached their duties to the respondent by not having advised on the fraud. This was clearly beyond their knowledge and the scope of their retainer (see para 14).

(2) The appellants could not be faulted for assuming the title was valid. The appellants were not party to the SPA. The SPA was a contract between the vendor, USESB and the purchaser, MISB. Therefore the duty was on the purchaser rather than the appellants to ensure that the SPA was free from any legal infirmity (see para 15).

(3) The appellants were relying on the records of the SSM and the Pendaftar Hak Milik (which had been defrauded by the third party). The appellants have no knowledge about the fraud. At the material times, all those records showed no legal infirmities in the title. Therefore, the appellants cannot be faulted for assuming the title was valid and for not giving proper advice on the fraud affecting the title of the said land when the fraud was discovered later (see para 17).

(4) The respondent's own admission in the earlier suit as well as the amended statement of claim in the present suit showed that the appellants were innocent victims as much as the respondent was. The respondent was estopped from taking a position different from that pleaded in its defence in the earlier suit (see para 22).

[Bahasa Malaysia summary

Rayuan ini berbangkit daripada keputusan Mahkamah Tinggi yang telah menolak permohonan perayu untuk membatalkan writ dan penyataan tuntutan responden di bawah A 18 k 19(1)(a) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Fakta secara ringkasnya adalah, responden telah memberikan kemudahan kredit kepada Magna Iron Sdn Bhd ('MISB') sebanyak RM19,700,000 untuk membiayai pembelian sebidang tanah ('tanah tersebut') dan sebagai cagaran, tanah tersebut telah dipajakkan kepada responden. Perayu-perayu telah dilantik oleh responden untuk menyediakan dan menyempurnakan dokumen pembiayaan tersebut termasuklah dokumen pajakan bagi pihak responden. Pihak-pihak telah memeterai perjanjian jual beli ('PJB') dan pindah milik tanah MISB dan pajakan responden

kemudiannya didaftarkan. Responden kemudian mengeluarkan jumlah pembiayaan sebanyak RM19,700,000 kepada penjual tanah, USESB. Pengarah-pengarah asal/pemegang-pemegang saham USESB ('pemilik-pemilik asal') memfailkan suatu tindakan terhadap responden, MISB, Pendaftar Hak Milik, Pejabat Tanah dan Galian Negeri Selangor dan pihak ketiga, menghujahkan bahawa pindah milik dan transaksi pajakan menyalahi undang-undang, suatu penipuan, batal dan tidak sah dan tidak ada kelulusan oleh Lembaga Tanah Ladang sebelum pindah milik tanah tersebut. Pembelaan tidak difailkan dan pemilik asal memperoleh penghakiman kerana tiada pembelaan. Akibatnya, perintah memorandum pindah milik dan dokumen pajakan yang dahulunya didaftarkan, dibatalkan. Responden meneruskan pemfailan tindakan terhadap perayu, dengan mendakwa bahawa, antara lain: perayu telah dengan sengaja gagal untuk menjalankan siasatan mereka sendiri bahawa kehendak-kehendak di bawah Kanun Tanah Negara khususnya yang berkaitan dengan 'kelulusan Lembaga Tanah Ladang' dipenuhi; perayu-perayu telah gagal untuk menasihati responden akan keperluan undang-undang urusniaga sedemikian dan akibat daripada kegagalan untuk memenuhinya; perayu-perayu tidak menjalankan ketekunan wajar dan cuai dalam mengemukakan dokumen pajakan tanpa terlebih dahulu mengesahkan dan mendapatkan kelulusan daripada Lembaga Tanah Ladang, dan bahawa perayu-perayu gagal untuk menuruti amalan hemat perbankan dalam melindungi kepentingan responden.

Diputuskan, membenarkan rayuan dengan kos:

(1) Kerugian yang didakwa dialami oleh responden adalah akibat daripada penipuan oleh pihak ketiga yang mana responden menjadi mangsa. Kerugian tersebut bukan disebabkan oleh kegagalan perayu untuk mendapatkan kelulusan Lembaga Tanah Ladang atau nasihatnya. Cagaran telah pun disempurnakan. Ia bukan kes yang diplidkan oleh responden bahawa perayu-perayu telah melanggar kewajipan mereka kepada responden dengan tidak memaklumkan mengenai penipuan tersebut. Ini adalah jelas di luar pengetahuan dan skop retainer mereka (lihat perenggan 14).

(2) Perayu-perayu tidak boleh dipersalahkan kerana menganggap hakmilik tersebut sah. Perayu-perayu bukan pihak kepada PJB. PJB adalah kontrak antara penjual, USESB dan pembeli, MISB. Oleh itu, kewajipan adalah pada pembeli bukannya perayu untuk memastikan bahawa PJB bebas daripada kelemahan mana-mana undang-undang (lihat perenggan 15).

(3) Perayu-perayu bersandarkan pada rekod SSM dan Pendaftar Hak Milik (yang telah ditipu oleh pihak ketiga). Perayu-perayu tidak mempunyai pengetahuan mengenai penipuan tersebut. Pada kesemua masa material, kesemua rekod menunjukkan tiada kelemahan undang-undang dalam

hakmilik. Oleh itu, perayu tidak boleh dipersalahkan kerana menganggap hakmilik adalah sah dan kerana tidak memberikan nasihat yang betul bagi penipuan yang menjejaskan hakmilik tanah tersebut apabila penipuan tersebut disedari kemudian (lihat perenggan 17).

(4) Pengakuan responden sendiri dalam guaman terdahulu serta pindaan penyataan tuntutan dalam guaman ini menunjukkan bahawa perayu adalah mangsa yang tidak bersalah sebagaimana juga responden. Responden diestop daripada mengambil kedudukan yang berbeza daripada yang diplidkan dalam pembelaannya dalam saman terdahulu (lihat perenggan 22F).]

Notes

For cases on writ and statement of claim, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 8171–8176.

Cases referred to

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corp Bhd [1993] 3 MLJ 36; [1993] 4 CLJ 7, SC (folld)

Caparo Industries plc v Dickman [1990] 2 AC 605, HL (refd)

Chang Yun Tai & Ors v HSBC Bank (M) Bhd & Other Appeals [2011] 7 CLJ 909, FC (refd)

Hu Chang Pee v Tan Sri Datuk Paduka (Dr) Ting Pek Khiing [1999] 3 MLJ 402, HC (folld)

Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor [1984] 2 MLJ 105, FC (folld)

Tan Sri Datuk Paduka (Dr) Ting Pek Khiing v Hu Chang Pee (also known as Hii Chang Pee) [2011] 6 MLJ 193; [2010] 1 LNS 1269, CA (refd)

YK Fung Securities Sdn Bhd v James Capel (Far East) Ltd [1997] 2 MLJ 621; [1997] 4 CLJ 300, CA (refd)

Legislation referred to

Rules of the High Court 1980 O 18 r 19(1)(a), (b), (d)

Appeal from: Suit No 21–NCVC–107 of 2011 (High Court, Kuala Lumpur)

Malik Imtiaz Sarwar (Zulpadli & Edham) for the appellants.
Navamalar Ganesan (Jasbeer Nur & Lee) for the respondent.

Ramly Ali JCA (delivering judgment of the court):

[1] The present appeal is against the decision of the learned High Court judge dated 15 August 2011 dismissing the appellant's application to strike out the respondent's writ and statement of claim under O 18 r 19(1)(a) of the Rules

of the High Court 1980 ('RHC').

FACTUAL BACKGROUND

[2] The defendants ('the appellants herein') were sued as partners of the legal firm of Messrs Zulpadli & Edham. The respondent herein (as the plaintiff at the court below) instituted an action against the appellants for profesional negligence, inter alia, for failing to obtain the approval of the estate land board and/or failing to exercise reasonable care and skill in regard to the same before presenting the memorandum of transfer ('Form 14A') dated 18 March 2008 and the charge form ('Form 16A') dated 26 June 2008 in respect of two properties known as Geran 53020, Lot No 886; and Geran 53021, Lot No 887, Mukim Ulu Selangor to the land authority for registration. As a result of which the said charge in the land in favour of the respondent was subsequently revoked and cancelled thereby causing losses of RM19,700,000 to the respondent being the amount released to the vendors of the land.

[3] The appellants ('as the defendants therein') have filed their statement of defence and counterclaim against the respondent whereby the appellants have pleaded that the respondent has committed a plot and/or conspiracy to injure the appellants. The appellants have pleaded particulars of the alleged conspiracy to sustain claims for general damages, exemplary and aggravated damages, interest and costs. The respondent then filed its reply and defence to the appellant's counterclaim. The appellants then filed a reply to the respondent's defence to counterclaim. Subsequently, by the summons in chambers dated 10 June 2011, the appellants applied to strike out the respondent's writ and statement of claim under O 18 r 19(1)(a) and/or (b) and/or (d) of the RHC 1980, on the ground that the respondent's claim does not disclose a reasonable cause of actions, scandalous, frivolous and vexatious and an abuse of the process of the court.

[4] On 15 August 2011, the learned High Court judge dismissed the appellants application on the ground, inter alia, that the respondent's claim does not appear to be hopeless, baseless or obviously unsustainable or doom to fail. The learned judge also found that the respondent has raised questions and issues in terms of the extent of the appellants' duty of care as solicitors towards their clients, the respondent, in the preparation of the charge documents and advice relating to the matter in question. The judge also found that the appellants have not discharged the burden of showing that the respondent's claim or cause of action is obviously bad, scandalous, frivolous or vexatious and is an abuse of the process of the court.

[5] The respondent has on 20 May 2008 granted a credit facility to one

Magna Iron Sdn Bhd ('MISB') for a sum of RM19,700,000 to finance the purchase of the land in question. As security, the said land was charged to the respondent.

[6] On 20 May 2008, the respondent appointed Messrs Zulpadli & Edham (a partnership constituting the appellants) for the preparation and completion of the said financing documents including the charge documents in favour of the respondent.

[7] The parties had entered into a sale and purchase agreement ('SPA') on 24 January 2008. The transfer of the land to MISB and the respondent's charge was registered on 23 June 2008. The respondent then released the financing amount of RM19,700,000 to the vendor of the land, USESB.

[8] Soon afterwards, the original directors/shareholders of USESB (original owners) filed an action at the Kuala Lumpur High Court suing the respondent (in the present appeal), MISB, Pendaftar Hak Milik, Pejabat Tanah dan Galian Negeri Selangor and a third party claiming that the transfer and charge transaction was illegal, null and void and perpetrated fraudulently and that there was no approval obtained from the estate land board prior to the transfer of the said land.

[9] None of the defendants therein filed their defence (save the respondent). The original owners obtained judgment in default of defence on 30 October 2009. Consequentially, the registrar of titles was ordered to cancel the memorandum of transfer and the charge documents which were previously registered. The original owners having procured the benefit of the judgment in default withdrew their claim against the respondent.

[10] The respondent commenced the present action against the appellants, alleging, inter alia, that:

(a) the appellants as the duly appointed solicitors for the respondent in the matter had intentionally failed to conduct their own investigations to satisfy themselves that requirements under the National Land Code particularly relating to 'prior approval of the Estate Land Board' were satisfied;

(b) the appellants had failed to advise the respondent as to the legal requirements of such a transaction and the consequence of a failure to fulfill the same;

(c) the appellants did not exercise due diligence and were negligent in presenting the charge documents without first verifying and obtaining approval from the estate land board; and

(d) the appellants failed to follow prudent banking practice in safeguarding the respondent's interest.

OUR FINDINGS

[11] It is settled law that a party suing in negligence must establish that:

(a) a duty of care of the nature asserted existed;

(b) the said duty had been breached by the defendant; and

(c) an injury had been caused by the defendant having breached the said duty

(see *Caparo Industries plc v Dickman* [1990] 2 AC 605).

[12] All the three ingredients must be established. If one ingredient is not established, the claim for negligence must fall.

[13] In the earlier suits filed by the original owners (directors/shareholders of USESB), the vendor of the said land, against the respondent, MISB and a third party involving the same transaction, the main complaint by the original owners of USESB, was that a fraud had been committed pertaining to the transfer of the said land. Judgment in default had been obtained against MISB and the third party. Therefore the allegation of fraud by MISB and the third party in the said action stands. The facts established, as per the amended statement of claim, in the original suit, is that the third party had presented to the Suruhanjaya Syarikat Malaysia ('SSM') fraudulent and/or forged documents to change the records of USESB, namely the directors, company secretary, shareholders, auditors and the registered address to the third party, being persons having no interest in the share of USESB. The facts also stand that the third party had also defrauded the Pendaftar Hak Milik, Pejabat Tanah dan Galian Negeri Selangor into issuing a new title of the said land; and after successfully defrauding the SSM and the *pendaftar hak milik*; the third party then executed the memorandum of transfer of MISB. That was registered and duly endorsed by the *pendaftar hak milik*. The respondent then disbursed the facility.

[14] From the amended statement of claim itself it is clear that the loss claimed to be suffered by the respondent was the consequence of a fraud by the third party to which the respondent fell victim. The loss was not caused by the failure of the appellants to procure the approval of the estate land board or advice on the same. It was clearly caused by the fraud of the third party. The security was in any event perfected. It is not the pleaded case of the respondent

that the appellants had breached their duties to the respondent by not having advised on the fraud. This was clearly beyond their knowledge and the scope of their retainer.

[15] The appellants could not be faulted for assuming the title was valid. The appellants are not party to the SPA. The SPA was a contract between the vendor (USESB) and the purchaser (MISB). Therefore the duty is cast on the purchaser (MISB) rather than the appellants to ensure that the SPA was free from any legal infirmity (see Federal Court decision in *Chang Yun Tai & Ors v HSBC Bank (M) Bhd & Other Appeals* [2011] 7 CLJ 909).

[16] The learned High Court judge in the present case had also stated in his grounds of judgment that:

> Nevertheless in all fairness to the defendants it is important for this court to immediately state that there is presently no evidence to implicate the defendants to the alleged fraud transfer of the property and arguably, and depending on a evidence to be produced, it may absolve the defendant of any liability if the cancellation of the said registration by the fourth defendant (registrar of lands) was due to the discovery of the fraudulent transfer of the property.

[17] From the statement of claim, it can be summed up that the appellants were relying on the records of the SSM and the *pendaftar hak milik* (which had been defrauded by the third party). The appellants have no knowledge about the fraud. At the material times, all those records showed no legal infirmities' in the title. Therefore, the appellants cannot be faulted for assuming the title was valid and for not giving proper advice on the fraud affecting the title of the said land when the fraud was discovered later.

[18] In the earlier suit filed by the original owners of USESB (the vendor of the said land), the respondent itself had taken the position that the registrar of titles was solely at fault and responsible for the loss suffered and that the respondent, through the appellants had adhered to all prudent banking practices in ganting the loan facility and that all documentation was valid.

[19] In this regard the respondent, in its defence in the said earlier suit, had pleaded as follows:

(a) at all material times the respondent through its firm of solicitors (the appellants) had adhered to all prudent banking practices;

(b) having followed the usual banking practices, the respondent was entitled to enter into the various agreements pertaining to the transfer of the land; and

(c) at all material times the various documents for the transfer of the said land were valid and enforceable in law for it having followed all the rules and procedures set by law.

[20] The foregoing in law amounts to judicial admissions which had been made by the respondent. In this regard, we are in agreement with the decision in the case of *Hu Chang Pee v Tan Sri Datuk Paduka (Dr) Ting Pek Khiing* [1999] 3 MLJ 402 (subsequently affirmed by the Court of Appeal in *Tan Sri Datuk Paduka (Dr) Ting Pek Khiing v Hu Chang Pee (also known as Hii Chang Pee)* [2011] 6 MLJ 193; [2010] 1 LNS 1269) as follows:

> (2) The plaintiff in entitled to rely on the defendant's affidavit filed in Suit No 22–18–96 as the basis in the present suit. What was stated by the defendant in his affidavit dated 3 December 1996 was actually an admission by him. Admission in pleadings is judicial admission and can be made the foundation of rights. Admission are admissible against the party making them.

[21] Further in *YK Fung Securities Sdn Bhd v James Capel (Far East) Ltd* [1997] 2 MLJ 621; [1997] 4 CLJ 300, Mahadev Shanker JCA held as follows:

> For the record, however, we must state here that it is the opinion of this court that once a party to litigation has admitted a fact in his pleadings he shall not be heard to contend the contrary in the trial or in any appeal therefrom.

[22] The respondent's own admission in the earlier suit as well as the amended statement of claim in the present suit show that the appellants were innocent victims as much as the respondent was. The respondent is estopped from taking a position different from that pleaded in its defence in the earlier suit.

CONCLUSION

[23] The position taken by the respondent in the earlier suit and the contents of the amended statement of claim in the present suit clearly negates its own case against the appellants in the present suit for profesional negligence. From the amended statement of claim and the affidavit evidence, the court is satisfied that none of the three ingredients required to establish its claim in negligence, has been fulfilled. The respondent's claim against the appellants is obviously unsustainable. Going for trial will not serve the respondent any better, as the pleadings themselves are sufficient to indicate that the respondent has no reasonable cause of action against the appellants.

[24] On the authorities of *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7 and *Loh Holdings Sdn Bhd*

v Peglin Development Sdn Bhd & Anor [1984] 2 MLJ 105, we hold that, this is an appropriate case for the respondent's claim be struck out under O 18 r 19(1)(a) of the RHC 1980. We therefore allowed the appeal with costs of RM20,000 to the appellants. The order of the High Court judge be set aside. We also make an order that the deposit be refunded to the appellant.

Appeal allowed with costs.

Reported by Afiq Mohamad Noor